STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS DIVISION OF WORKERS' COMPENSATION

INITIAL STATEMENT OF REASONS

Subject Matter of Regulations: Workers' Compensation – Return to Work

TITLE 8, CALIFORNIA CODE OF REGULATIONS Sections 10001 through 10005.

Section 10001	Definitions.
Section 10002	Offer of Work; Adjustment of Permanent Disability Payments.
Section 10003	Form [DWC AD 10003 Notice of Offer of Work].
Section 10004	Return to Work Program.
Section 10005	Form [DWC AD 10005 Request for Reimbursement of
	Accommodation Expenses l.

BACKGROUND TO REGULATORY PROCEEDING

The proposed regulations are required by a legislative enactment - Senate Bill 899 (Chapter 34, stats. of 2004, effective April 19, 2004). Senate Bill 899 included Labor Code section 139.48 which provides for the Return to Work Program, reimbursement, requirements for return to work of injured employee, regulatory authority and funding source. Labor Code section 4658 provides for permanent disability, computation, benefits schedules, and increase or decrease in disability payments depending on offer or termination of regular, modified or alternative work. Labor Code section 4658.1 defines the meaning of regular work, modified work, and alternative work.

Labor Code section 139.48(a)(1) provides that the Administrative Director shall establish the Return-to-Work Program in order to promote the early and sustained return to work of the employee following a work-related injury or illness.

Labor Code section 139.48(2)(b) provides that upon submission by eligible employers of documentation in accordance with regulations adopted pursuant to subdivision (h), the Administrative Director shall pay the workplace modification expense reimbursement allowed under this section.

Labor Code section 139.48(2)(c) provides that the Administrative Director shall reimburse an eligible employer for expenses incurred to make workplace modifications to accommodate the employee's return to modified or alternative work, as follows:

- (1) The maximum reimbursement to an eligible employer for expenses to accommodate each temporarily disabled injured worker is one thousand two hundred fifty dollars (\$ 1,250).
- (2) The maximum reimbursement to an eligible employer for expenses to accommodate each permanently disabled worker who is a qualified injured worker is two thousand five hundred dollars (\$ 2,500). If the employer received reimbursement under paragraph (1), the amount of the reimbursement under paragraph (1) and this paragraph shall not exceed two thousand five hundred dollars (\$ 2,500).
- (3) The modification expenses shall be incurred in order to allow a temporarily disabled worker to perform modified or alternative work within physician-imposed temporary work restrictions, or to allow a permanently disabled worker who is an injured worker to return to sustained modified or alternative employment with the employer within physician-imposed permanent work restrictions.
- (4) Allowable expenses may include physical modifications to the worksite, equipment, devices, furniture, tools, or other necessary costs for accommodation of the employee's restrictions.

Labor Code section 4658(a)(1) provides that for injuries occurring prior to January 1, 1992, if the injury causes permanent disability, the percentage of disability to total disability shall be determined, and the disability payment computed and allowed, according to paragraph (1). However, in no event shall the disability payment allowed be less than the disability payment computed according to paragraph (2).

Column 1 Column 2

Range Number of weeks for which twoof percentage thirds of average weekly
of permanent earnings allowed for each 1
disability incurred: percent of permanent disability
within percentage range:

Under 10	3
10-19.75	4
20-29.75	5
30-49.75	6
50-69.75	7
70-99.75	.8

The number of weeks for which payments shall be allowed set forth in column 2 above based upon the percentage of permanent disability set forth in column 1 above shall be cumulative, and the number of benefit weeks shall increase with the severity of the

disability. The following schedule is illustrative of the computation of the number of benefit weeks:

Column 1-	Column 2-
Percentage	Cumulative
of permanent	number of
disability	benefit weeks:
incurred:	

4	*	01	114	***	\sim	~	٠
		CI			т.	"	
		•	\mathbf{u}		$\overline{}$	u	•

5	FS6)15.00
10	30.25
15	50.25
20	70.50
25	95.50
30	120.75
35	150.75
40	180.75
45	210.75
50	241.00
55	276.00
60	311.00
65	346.00
70	381.25
75	421.25
80	461.25
85	501.25
90	541.25
95	581.25
100	for life

Labor Code section 4658(a)(2) provides that two-thirds of the average weekly earnings for four weeks for each 1 percent of disability, where, for the purposes of this subdivision, the average weekly earnings shall be taken at not more than seventy-eight dollars and seventy-five cents (\$ 78.75).

Labor Code section 4658(b)(1) provides that this subdivision shall apply to injuries occurring on or after January 1, 1992. If the injury causes permanent disability, the percentage of disability to total disability shall be determined, and the disability payment computed and allowed, according to paragraph (1). However, in no event shall the disability payment allowed be less than the disability payment computed according to paragraph (2).

Column 1--Range Column 2--Number

of percentage of weeks for which two-thirds of permanent of average weekly earnings allowed disability incurred: for each 1 percent of permanent

Return to Work Regulations 8 CCR §§ 10001 through 10005. Initial Statement of Reasons (October 2005) - 3 -

disability within percentage range:

Under 10	 3
10-19.75	 4
20-24.75	 5
25-29.75	 6
30-49.75	 7
50-69.75	 8
70-99.75	 9

The numbers set forth in column 2 above are based upon the percentage of permanent disability set forth in column 1 above and shall be cumulative, and shall increase with the severity of the disability in the manner illustrated in subdivision (a).

Labor Code section 4658(b)(2) provides that two-thirds of the average weekly earnings for four weeks for each 1 percent of disability, where, for the purposes of this subdivision, the average weekly earnings shall be taken at not more than seventy-eight dollars and seventy-five cents (\$78.75).

Labor Code section 4658(c) provides that this subdivision shall apply to injuries occurring on or after January 1, 2004. If the injury causes permanent disability, the percentage of disability to total disability shall be determined, and the disability payment computed and allowed as follows:

Column 1Range	Column 2—Number of
of percentage	weeks for which two-thirds of
of permanent	average weekly earnings allowed
disability incurred:	for each 1 percent of permanent
	disability within percentage range:

Under 10	4
10-19.75	5
20-24.75	5
25-29.75	6
30-49.75	7
50-69.75	8
70-99.75	9

The numbers set forth in column 2 above are based upon the percentage of permanent disability set forth in column 1 above and shall be cumulative, and shall increase with the severity of the disability in the manner illustrated in subdivision (a).

Labor Code section 4658(d)(1) provides that this subdivision shall apply to injuries occurring on or after the effective date of the revised permanent disability schedule adopted by the administrative director pursuant to Section 4660. If the injury causes

permanent disability, the percentage of disability to total disability shall be determined, and the basic disability payment computed as follows:

Column 1Range	Column 2Number of
of percentage	weeks for which two-thirds
of permanent	of average weekly earnings
disability incurred:	allowed for each 1 percent of
	permanent disability within
	percentage range:

0.25-9.75	3
10-14.75	4
15-24.75	5
25-29.75	6
30-49.75	7
50-69.75	8
70-99.75	16

The numbers set forth in column 2 above are based upon the percentage of permanent disability set forth in column 1 above and shall be cumulative, and shall increase with the severity of the disability in the manner illustrated in subdivision (a).

Labor Code section 4658(d)(2) provides that if, within 60 days of a disability becoming permanent and stationary, an employer does not offer the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, each disability payment remaining to be paid to the injured employee from the date of the end of the 60-day period shall be paid in accordance with paragraph (1) and increased by 15 percent. This paragraph shall not apply to an employer that employs fewer than 50 employees.

Labor Code section 4658(d)(3)(A) provides that if, within 60 days of a disability becoming permanent and stationary, an employer offers the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, and regardless of whether the injured employee accepts or rejects the offer, each disability payment remaining to be paid to the injured employee from the date the offer was made shall be paid in accordance with paragraph (1) and decreased by 15 percent.

Labor Code section 4658(d)(3)(B) provides that if the regular work, modified work, or alternative work is terminated by the employer before the end of the period for which disability payments are due the injured employee, the amount of each of the remaining disability payments shall be paid in accordance with paragraph (1) and increased by 15 percent. An employee who voluntarily terminates employment shall not be eligible for payment under this subparagraph. This paragraph shall not apply to an employer that employs fewer than 50 employees.

Labor Code section 4658(d)(4) provides that for compensable claims arising before April 30, 2004, the schedule provided in this subdivision shall not apply to the determination of permanent disabilities when there has been either a comprehensive medical-legal report or a report by a treating physician, indicating the existence of permanent disability, or when the employer is required to provide the notice required by Section 4061 to the injured worker.

Labor Code section 4658.1(a) provides that "Regular work" means the employee's usual occupation or the position in which the employee was engaged at the time of injury and that offers wages and compensation equivalent to those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.

Labor Code section 4658.1(b) provides that "Modified work" means regular work modified so that the employee has the ability to perform all the functions of the job and that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.

Labor Code section 4658.1(c) provides that "Alternative work" means work that the employee has the ability to perform, that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and that is located within reasonable commuting distance of the employee's residence at the time of injury.

Labor Code section 4658.1(d) provides that for the purpose of determining whether wages and compensation are equivalent to those paid at the time of injury, the wages and compensation for any increase in working hours over the average hours worked at the time of injury shall not be considered.

Labor Code section 4658.1(e) provides that for the purpose of determining whether wages and compensation are equivalent to those paid at the time of injury, actual wages and compensation shall be determined without regard to the minimums and maximums set forth in Chapter 1 (commencing with Section 4451).

Labor Code section 4658.1(f) provides that the condition that regular work, modified work, or alternative work be located within a reasonable distance of the employee's residence at the time of injury may be waived by the employee. The condition shall be deemed to be waived if the employee accepts the regular work, modified work, or alternative work and does not object to the location within 20 days of being informed of the right to object. The condition shall be conclusively deemed to be satisfied if the offered work is at the same location and the same shift as the employment at the time of injury.

The proposed regulations, therefore, are necessary in order to implement the provisions of Labor Code sections 139.48, 4658 and 4658.1, as amended by Senate Bill 899 (Chapter 34, stats. of 2004, effective April 19, 2004).

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS

The Division relied upon:

Workers' Compensation Research Institute (WCRI), *Impact of Age, Education, Injury and Employment Status on Return to Work Outcomes Quantified in New WCRI Study*, http://wcirbonline.org/wcirb_wire/pdf/2003/18_workers_comp_losses_expenses_2002.pdf http://wcirbonline.org/wcirb_wire/pdf/2004/11759_1 report CY2003.pdf and http://wcirbonline.org/wcirb_wire/pdf/2005/2004_loss_and_expenses.pdf,

California Commission on Health and Safety and Workers' Compensation, *Selected Indicators in Workers' Compensation: A Report Card for Californians* (February 2005) http://www.wcrinet.org/result/rtw_4states_result.html

Krause, Nilas, Lisa Dasinger, and Andrew Wiengand, *Does Modified Work facilitate Return to Work for Temporarily or Permanently Disabled Workers?* (1997) http://www.dir.ca.gov/CHSWC/Modified_Work_Krause.html.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

No specific technology or equipment is required.

FACTS ON WHICH THE AGENCY RELIES IN SUPPORT OF ITS INITIAL DETERMINATION THAT THE REGULATIONS WILL NOT HAVE A SIGNIFICANT ADVERSE IMPACT ON BUSINESS

All large businesses, including self-insureds and third party claims administrators are required by law to provide workers' compensation benefits to injured workers and comply with workers' compensation regulations. A business which complies with the requirement that an employer must serve the employee with a notice of offer of regular work, modified work or alternative work within 60 days from the date that the injured worker's condition becomes permanent and stationary would not be required to increase each payment of permanent partial disability by 15 percent, and, in fact, would be eligible for a 15 percent decrease for remaining permanent partial disability payments.

The requirement that an employer must serve the employee with a notice of offer of regular work, modified work or alternative work within 60 days from the date that the injured worker's condition becomes permanent and stationary or be required to increase each remaining payment of permanent partial disability by 15 percent, does not apply to small businesses because this provision only applies to employers with 50 or more employees.

With respect to the Return to Work Program contained in the regulations, if a business which employs 50 or fewer full-time employees incurs expenses in order to make workplace modifications to accommodate an employee's return to modified or alternative work, that employer may be reimbursed by the Return to Work Fund.

1. Proposed Section 10001. Definitions.

Specific Purpose of Section 10001:

Section 10001 lists and defines the terms used in these regulations. The purpose of the definitions is to implement, interpret, and make specific Labor Code sections 139.48, 4658, and 4658.1 and to ensure that the meanings of the terms are clearly understood by the workers' compensation community.

This section is amended to provide definitions for the following key terms: "Alternative work," "Claims Administrator," "Modified Work," "Permanent and stationary," and "Regular work."

Necessity:

It is necessary to define each of the key terms used in the Return to Work regulations to ensure that the content and meaning of the regulations are clearly understood by the workers' compensation community.

Specifically, the definition of "Alternative work" is necessary so the parties understand what type of work must be offered to the worker in the return to work context. This term is referred to in the following sections: 10002(b)(1) through (4); 10002(d); 10004(f); 10004(f)(1) through (2); and 10004(j)(3). This definition is important because failure to offer such work within the statutory time frames can result in a 15% increase in payment of permanent partial disability benefits. Additionally, this definition is necessary because a small business that incurs expenses in order to make workplace modifications to accommodate an employee's return to modified or alternative work, may be reimbursed for the expenses incurred by the Return to Work Fund.

It is necessary to define "Claims Administrator" because the claims administrator plays an important role in the regulations. As specified in the following sections of the regulations, 10002(b)(3), 10002(c), 10002(c)(3) and 10003, the claims administrator must serve the offer of work on behalf of the employer by the statutory time lines. Additionally, the employer or claims administrator must fill out DWC-AD Form 10003, the Notice of Offer of Regular Work.

It is necessary to define "Modified work" because failure to offer such work within the statutory time frames can result in a 15% increase in payment of permanent partial disability benefits. Additionally, an employee who voluntarily terminates his or her regular work, modified work, or alternative work shall not be eligible for the 15 percent increase in permanent partial disability payments.

It is necessary to define "Permanent and stationary" because an employer can serve the employee with a notice of offer of regular work, modified work or alternative work only after the employee has become permanent and stationary. As stated above, failure to adhere to the statutory time frames can result in a 15% increase in payment of permanent partial disability benefits.

It is necessary to define "Regular work" because as indicated in the definitions of "alternative work" and "modified work" failure to offer such work within the statutory time frames can result in a 15% increase in payment of permanent partial disability benefits. Additionally, an employee who voluntarily terminates his or her regular work, modified work, or alternative work shall not be eligible for the 15 percent increase in permanent partial disability payments.

Consideration of Alternatives:

No more effective alternative to any of the definitions, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

2. Proposed Section 10002. Offer of Work; Adjustment of Permanent Disability Payments.

Specific Purpose of Section 10002:

The purpose of this section is to clarify Labor Code section 4658 and to specify the application of adjustment of permanent disability payments.

Subdivision (a) clarifies that it shall apply to all injuries occurring on or after January 1, 2005, and shall apply to the following employers: (1) insured employers who employed 50 or more employees at the time of the most recent policy inception or renewal date for the insurance policy that was in effect at the time of the employee's injury; and (2) self-insured employers who employed 50 or more employees at the time of the most recent filing by the employer of the Self-Insurer's Annual Report that was in effect at the time of the employee's injury; and (3) legally uninsured employers who employed 50 or more employee at the time of injury.

Subdivision (b) (1) through (4) clarify that within 60 days from the date that an injured employee's condition becomes permanent and stationary: (1) if an employer does not serve the employee with a notice of offer of regular work, modified work or alternative work for a period of at least 12 months, each payment of permanent partial disability remaining to be paid to the employee from the date of the end of the 60 day period shall be paid in accordance with Labor Code section 4658(d)(1) and increased by 15 percent; (2) if an employer serves the employee with a notice of offer of regular work, modified work or alternative work for a period of at least 12 months, and in accordance with the requirements set forth in paragraphs (3) and (4), each payment of permanent partial disability remaining to be paid from the date the offer was served on the employee shall

be paid in accordance with Labor Code section 4658(d)(1) and decreased by 15 percent, regardless of whether the employee accepts or rejects the offer; (3) the employer shall use Form DWC-AD 10133.53 (Section 10133.53) to offer modified or alternative work, or Form DWC-AD 10003 (Section 10003) to offer regular work, additionally, the claims administrator may serve the offer of work on behalf of the employer; and (4) the regular, alternative, or modified work that is offered by the employer pursuant to paragraph (2) shall be located within a reasonable commuting distance of the employee's residence at the time of the injury, unless the employee waives this condition. This condition shall be deemed to be waived if the employee accepts the regular, modified, or alternative work, and does not object to the location within 20 days of being informed of the right to object. The condition shall be conclusively deemed to be satisfied if the offered work is at the same location and the same shift as the employment at the time of injury.

Subdivision (c) clarifies that in the event there is a dispute as to an employee's permanent and stationary status, and there has been a notice of offer of work served on the employee in accordance with subdivision (b), the claims administrator may withhold 15% from each payment of permanent partial disability remaining to be paid from the date the notice of offer was served on the employee until there has been a final judicial determination of the date that the employee is permanent and stationary pursuant to Labor Code section 4062. Where there is a final judicial determination that the employee is permanent and stationary on a date later than the date relied on by the employer in making its offer of work, the employee shall be reimbursed any amount withheld up to the date a new notice of offer of work is served on the employee pursuant to subdivision (b). Where there is a final judicial determination that the employee is not permanent and stationary, the employee shall be reimbursed any amount withheld up to the date of the determination. The claims administrator is not required to reimburse permanent partial disability benefit payments that have been withheld pursuant to this subdivision during any period for which the employee is entitled to temporary disability benefit payments.

Subdivision (d) clarifies that if the employee's regular work, modified work, or alternative work that has been offered by the employer pursuant to paragraph (1) of subdivision (b) and has been accepted by the employee, is terminated prior to the end of the period for which permanent partial disability benefits are due, the amount of each remaining permanent partial disability payment from the date of the termination shall be paid in accordance with Labor Code section 4658 (d) (1), as though no decrease in payments had been imposed, and increased by 15 percent. An employee who voluntarily terminates his or her regular work, modified work, or alternative work shall not be eligible for the 15 percent increase in permanent partial disability payments pursuant to this subdivision.

Subdivision (e) clarifies that nothing in this section shall prevent the parties from settling or agreeing to commute the permanent disability benefits to which an employee may be entitled. However, if the permanent disability benefits are commuted by a Workers' Compensation Administrative Law Judge or the Workers' Compensation Appeals Board pursuant to Labor Code section 5100, the commuted sum shall account for any

adjustment that would have been required by this section if payment had been made pursuant to Labor Code section 4658.

Necessity:

This section is necessary to explain the application of adjustment of permanent disability payments. This is important because if statutory deadlines are not followed, an employer may have to pay 15% more in permanent partial disability payments.

The pre-public comment period comments and advisory committee members indicated that there was a question as to who is considered an "employee" for purposes of identifying which employees should be counted to make up the "50 or more employees" stated in the statute. Thus, it is necessary for the regulation to clarify this requirement. Pre-comment period comments also indicated that there may be disputes regarding the "permanent and stationary" date. Therefore, it is necessary to clarify the process to follow in the event of disputes. Pre-public commenters also wanted clear guidance as to when permanent partial disability payments would be decreased by 15% and when they would be increased by 15%.

Consideration of Alternatives:

No more effective alternative to any of the definitions, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

3. Proposed Section 10003. Form [DWC AD 10003 Notice of Offer of Work].

Specific Purpose of Section 10003:

The purpose of this section is to provide a form for the employer or claims administrator to fill out in order to give notice of offer of regular work. The first page of the form is to be completed by the employer or claims administrator. The second page of the form is to be completed by the employee. The last page of the form is a proof of service.

Necessity:

The notice of offer or regular work form is necessary because Labor Code section 4658(d)(3)(A) provides that the offer shall be made in the form and manner prescribed by the Administrative Director. This section provides employers with a form that meets the statutory requirements. It also provides the employee with information regarding the offer or regular work, and provides a section for the employee to complete and indicate if the offer is accepted or rejected. It is necessary to provide information to the employee regarding the offer because the employee may otherwise fail to understand the significance and requirements of the offer to return to work. The purpose of the proof of service is to provide evidence of the date the offer was made as the statute requires that the offer be made within 60 days of a disability becoming permanent and stationary.

Consideration of Alternatives:

No more effective alternative to any of the definitions, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

4. Proposed Section 10004. Return to Work Program

Specific Purpose of Section 10004:

The purpose of this section is to implement Labor Code section 139.48. "Eligible employer" is defined to clarify how the statute's reference to 50 employees will be interpreted: it will be based on the employer's payroll records or other equivalent documentation or evidence. "Full-time employee" is defined as the term is used in the statute's definition of "eligible employee." The purpose of defining the term is to clarify the meaning of the statute. The purpose of the remainder of the section is to provide the procedure regarding the administration of the fund: the maximum amounts the employer is entitled to receive; the types of expenses that may be reimbursed; the form the employer must use if seeking reimbursement; the three types of responses available to the Administrative Director; the reimbursement priority in the event that there are insufficient funds; and the employer's right to appeal the decision of the Administrative Director.

Necessity:

The "Return to Work Program" section of the proposed regulations is necessary because Labor Code section 139.48 provides that the Administrative Director shall establish the Return to Work Program in order to promote the early and sustained return to work of the employee following a work-related injury or illness.

This section provides employers with necessary information regarding use of the Return to Work Program: who is eligible for the program; how the program is funded; what reimbursement is available; how to apply; how decisions are made regarding reimbursement; and how to appeal a decision made by the Administrative Director. Employers must be made aware of this information in order to effectively participate in the program.

Consideration of Alternatives:

No more effective alternative to any of the definitions, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

5. Proposed Section 10005. Form [DWC AD 10005 Request for Reimbursement of Accommodation Expenses].

Specific Purpose of Section 10005:

The purpose of this section is to provide a form for the employer or claims administrator to fill out in order to request reimbursement of accommodation expenses for injuries occurring on or after July 1, 2004.

Necessity:

Labor Code section 139.48 provides that the Administrative Director shall establish the Return to Work Program in order to promote the early and sustained return to work of the employee following a work-related injury or illness. This form is necessary because it provides for consistency in requesting reimbursement for accommodation expenses.

This consistency could result in more rapid and accurate processing of these requests by avoiding delay that occurs when a reviewer has to request additional pertinent information in order to process a request. This can have the positive effect of encouraging employers to make workplace modifications to accommodate an employee's return to modified or alternative work.

Consideration of Alternatives:

No more effective alternative to any of the definitions, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.